her consent, you will acquit defendant of assault with intent to rape, although you may believe such violence was against the will and consent of said Mary Chambers."

However, the court gave the following special charge requested by defendant: "You are instructed that, before you can convict defendant on the charge of assault with the intent to rape as charged in the indictment, you must believe beyond a reasonable doubt that defendant herein intended to have carnal intercourse with the prosecuting witness, Mary Chambers, at all events, and notwithstanding resistance on the part of the said Mary Chambers, and unless you so believe beyond a reasonable doubt you will acquit him of the charge of assault to rape."

And in the court's main charge the jury were instructed: "Bearing in mind the instructions given you elsewhere in this charge, if you find and believe from the evidence beyond a reasonable doubt that defendant, Lee Davis, on or about the 31st day of August, 1900, and before the filing of this indictment herein, in Tarrant county, Texas, did make an assault upon Mary Chambers, with the intent to commit the crime of rape,—that is, with the intent by force or threat to have carnal knowledge of the said Mary Chambers, without her consent and against her will,—bearing in mind the definition of rape, as above given, then you will find defendant guilty of assault with intent to commit the crime of rape, and assess his punishment at confinement in the penitentiary for some period of time not less than two years; but unless you do find beyond a reasonable doubt that defendant assaulted her with the intent to rape her, as rape is hereby defined, you will acquit defendant of assault with intent to rape."

We think that the court's charge, coupled with the special charge given, clearly covers appellant's contention insisting that a direct charge on the specific intent to rape should be given. This being true, appellant has no ground of complaint for the refusal of his special charges.

Appellant also insists that the verdict of the jury is excessive, and contrary to the law and the evidence. We do not think either of these contentions is correct.

Appellant filed a motion in arrest of judgment on the ground that, defendant being a negro, the grand jury returning the bill of indictment against him were all white men, the negroes being excluded from the grand jury on account of their race, color, and previous condition of servitude. By the affidavit it is shown that about 10 per cent. of the voters of Tarrant county are negroes; the total number of voters in the county is 11,000; that many of said negro voters are qualified for jury service, both grand and petit; that no negroes, with affiant's knowledge, have ever been allowed to sit on the grand or petit juries in said county. Affiant further says there is a strong prejudice in said county against negroes sitting on juries, and on account of said prejudice negroes are excluded from jury service altogether, and have been so excluded for the last 20 years. The court overruled the motion. In this there was no error. It comes too late after verdict, and, if the facts as set up in said motion were true, they should have been made by direct attack upon the indictment prior to the trial. Garnett v. State, 60 S. W. 765, 1 Tex. Ct. Rep. 611.

The judgment is affirmed.

ARROYO v. STATE.[1]

(Court of Criminal Appeals of Texas. June 11, 1902.)

CONSTITUTIONAL LAW—CITY CHARTER—DELEGATION OF AUTHORITY TO SUSPEND LAWS—REGULATION OF SALOONS.

1. Under Const. art. 1, § 28, providing that no power of suspending laws in the state shall be exercised except by the legislature, the legislature cannot delegate its authority in a municipal charter to set aside, vacate, suspend, or repeal the general laws of the state; and Dallas City Charter (Sp. Laws 1899, p. 115) § 106, authorizing the city to regulate the opening and closing of saloons on Sunday, and section 199, prescribing that the charter shall supersede the general laws in case of a conflict, and a city ordinance in conflict with the state law, are void.

Henderson, J., dissenting.

Appeal from Dallas county court; Ed. S. Lauderdale, Judge.

Frank Arroyo was convicted of selling liquor on Sunday, and he appeals. Affirmed.

Lemmon & Lively, J. J. Eckford, A. P. Wozencraft, and F. M. Etheridge, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted for selling liquor on Sunday, in the city of Dallas, in violation of the state law.

He filed a plea to the jurisdiction of the county court, and in support of this cites us to section 106 of the charter (Sp. Laws 1899, p. 115), which delegates to the city of Dallas authority "to open, close, and regulate saloons and all places where intoxicating or fermented liquors are sold on Sunday and to prescribe what hours on Sunday such sales can be made; and what hours such places must be closed and sales prohibited; also all places of amusement and business;" and in further support of his contention introduced the following ordinance: "Where any merchant, grocer, dealer or trader in wares or merchandise are engaged in any lawful business whatsoever, or the agent or employé of such person who shall sell or barter or permit his place of business to be opened for business or traffic on Sunday between the hours of 9 o'clock a. m. and 4 o'clock p. m., will be fined not less than twenty nor more than fifty dollars: provided,

[1] Rehearing denied June 27, 1902.

this article shall be subject to all exemptions contained in article 200 of the state Penal Code; and provided further, the front doors of no saloon shall be kept open at any time on Sunday." Section 199 of the charter of Dallas was also introduced, and thus it reads: "The provisions of this act in so far as they may conflict with any state law shall be held to supersede said laws to that extent, and shall not be held invalid on account of such conflict." Sp. Laws 1899, p. 139. The ordinance fixing the hours for opening saloons on Sunday is in direct conflict with the general law of the state on this subject. The state law prohibits the opening of the saloon during the entire day of Sunday, whereas the ordinance only prohibits it from 9 o'clock a. m. until 4 o'clock p. m.

Thus we are confronted with the proposition, which appellant assumes to be correct, that the legislature has authority to delegate power to the city council of the city of Dallas, under its special charter, to supersede and set aside any state law which may come within the terms of the delegated authority. Article 1, § 28, of the state constitution provides: "No power of suspending laws in this state shall be exercised, except by the legislature." Prior to 1874 this section was as follows: "No power of suspending laws in this state shall be exercised, except by the legislature, or its authority." It may have been the law, or a correct contention, under prior constitutions in this state, to assume and assert the proposition here contended for by appellant; but with the change of the constitution the right of the legislature to delegate its authority ceased to exist. It is not necessary to go into the history of the reasons for this change in the constitution, for it is too well known and too fresh to be easily forgotten. Without reviewing the history of the oppressions which grew out of the suspension of laws by reason of such delegation of legislative authority and the declaration of martial law scarcely more than a quarter of a century in the past, it is sufficient to state the fact of such occurrences, and that this change in the organic law swiftly followed, prohibiting such action by the legislature. The legislature is but one of the three co-ordinate branches of this government, and has no authority to set aside and override the express limitations upon its power. This matter has been reviewed in our state by our courts of last resort, and the matters fully and freely discussed, the result of those decisions being adverse to appellant's contention. Therefore we deem it unnecessary to enter into a further discussion of the matter. In support of our conclusion, holding that the position assumed by appellant is not the law, we cite the following authorities: Ex parte Ogden (Tex. Cr. App.) 66 S. W. 100; Burton v. Dupree (Tex. Civ. App.) 46 S. W. 272; Ex parte Coombs, 38 Tex. Cr. R. 648, 44 S. W. 854; Ex parte Ginnochio, 30 Tex. App. 584, 18 S. W. 82; Ex parte Sundstrom, 25 Tex. App. 133, 8 S. W. 207; Bohmy v. State, 21 Tex. App. 597, 2 S. W. 886; Flood v. State, 19 Tex. App. 584; Angerhoffer v. State, 15 Tex. App. 613; 3 Am. & Eng. Enc. Law, p. 698 et seq. and notes for collated authorities. Under these authorities, and under the constitution, the legislature had no right to delegate its authority in a municipal charter to set aside, vacate, suspend, or repeal the general laws of this state. Any act of the legislature which seeks to confer such jurisdiction upon a municipal corporation is violative of the constitution, and therefore void. The city ordinance, as well as the provisions in the charter granted the city of Dallas, relied upon by appellant, being in conflict with section 28 of the bill of rights, in so far as they undertake to grant authority to supersede the state law, are null and void.

There being no merit in appellant's proposition, and no error appearing in the record, the judgment is affirmed.

HENDERSON, J. (dissenting). As said in the opinion of the majority of the court, the simple proposition involved in this case is the power of the legislature to authorize the council of the city of Dallas by ordinance to pass a law contravening the state Sunday law with reference to the opening and closing of saloons on Sunday. My Brethren hold that the legislature does not possess this power, basing their opinion on article 1, § 28, of our state constitution, which says: "No power of suspending laws in this state shall be exercised, except by the legislature." In support of their view, it is claimed that the question is res adjudicata, and the following authorities are cited: Ex parte Ogden (Tex. Cr. App.) 66 S. W. 1100; Burton v. Dupree (Tex. Civ. App.) 46 S. W. 272; Coombs v. State, 38 Tex. Cr. R. 648, 44 S. W. 854; Ex parte Ginnochio, 30 Tex. App. 584, 18 S. W. 82; Ex parte Sundstrom, 25 Tex. App. 133, 8 S. W. 207; Bohmy v. State, 21 Tex. App. 597, 2 S. W. 886; Flood v. State, 19 Tex. App. 584; Angerhoffer v. State, 15 Tex. Cr. R. 613. I do not believe that a fair interpretation of any of the authorities cited will maintain the views announced by the court. In Ogden's Case the charter of the city of Beaumont did not give the power to the council to prohibit or regulate by ordinance pool selling on horse races, and so the question of the power of the legislature to delegate its authority to cities did not arise, though it is alluded to in the opinion. In the Coombs Case the question of the delegation of power is also discussed, but an examination of that case will show that it was not necessary to a decision of the matters involved; the question there being simply as to the power of the legislature to confer jurisdiction on municipal courts, as such, over state cases. Ginnochio's Case relates to the same question. In Angerhoffer's Case, and in Flood's Case, the question as to the power of the legislature, by either general or special

charter, to confer authority on municipalities to pass ordinances contravening state laws, did not arise, as in both of said cases it was distinctly held that the charter granted to the city by the legislature did not confer jurisdiction upon the municipality or give the right to pass the ordinance in question. And it may be said that in both of said cases the doctrine is expressly recognized, as laid down in Davis v. State, 2 Tex. App. 425, that the legislature has the power to grant to city governments created by general or special charter the right and authority to pass ordinances contravening and abrogating the state penal statutes. The same doctrine has been reaffirmed in Ex parte Garza, 28 Tex. App. 381, 13 S. W. 779, 19 Am. St. Rep. 845, and see Reuter v. State (Tex. Cr. App.) 67 S. W. 505. I do not understand the decisions on this subject to be overturned by any of the cases. This doctrine is supported by and in harmony with the decisions of other states and with the text-books. State v. Binder, 38 Mo. 450; State v. Clarke, 54 Mo. 17, 14 Am. Rep. 471; State v. De Bar, 58 Mo. 395; Seibold v. People, 86 Ill. 33; Village of St. Johnsbury v. Thompson, 59 Vt. 300, 9 Atl. 571, 59 Am. Rep. 731; Mayor, etc., v. Minor, 70 Ga. 191; 1 Dill. Mun. Corp. §§ 87, 88, 308; Cooley, Const. Lim. (4th Ed.) p. 242. The proposition announced by these authorities is that the legislature is omnipotent except as restrained by some provision of the state or federal constitution. As was said in Lytle v. Halff, 75 Tex. 128, 12 S. W. 610: "The constitution of a state operates upon the lawmaking branch of the government purely as a limitation, and the legislature exercises plenary power in the enactment of laws, except as such authority is expressly or by clear implication therein denied." It is insisted, however, that the clause of our constitution before cited prohibits a delegation by the legislature to municipal corporations to suspend state laws, it being claimed that the authority granted to a city to enact an ordinance in contravention of a state law on the same subject is a delegation of authority to suspend the state law. I do not so understand it. The clause of the constitution in question had its origin in the English bill of rights of 1689, and was intended to abridge the right of the king to suspend laws. So, our own bill of rights on the same subject had direct reference to an inhibition on the power of the executive arm of the government. This is evident from contemporaneous history both in connection with the English bill of rights and our own bill of rights. It is intimated in the opinion of the court that, under this clause of the constitution as it existed prior to the constitution of 1876, the legislature may have had the right to delegate the authority claimed; but by the omission from said provision of the clause, "or its authority," from our present constitution, a limitation was placed on the legislature, and that it alone could suspend laws of the state, but it could not delegate its power to any other authority. In reply to this, I would say that it has never been held by any court, so far as I am advised, that the authority granted to municipal corporations to pass laws in contravention of or in derogation of state laws on the same subject is the grant of a power to suspend the state law. I understand that when a law is suspended the law continues in esse,—for the time being is not operative,—but as soon as the power of suspension is relaxed it goes into immediate operation. The writ of habeas corpus may be suspended, rendered inoperative for the time, and as soon as the power is relaxed, which stays the writ, it springs into immediate vitality. So with any other law that is merely suspended. But this is not the case here, where the power is granted, not to suspend for the time being the state law, but to supersede that law with another law, making the latter the rule of conduct in the particular locality. In such case the state law is absolutely displaced and superseded by the municipal law. There is no more suspension here of state law than if the legislature had passed an act applicable alone to the city of Dallas, making a new rule of conduct in that city on the subject of the Sunday law. In such case it would be a misuse of terms to call the action of the legislature a suspension of the state law. Mr. Cooley, in speaking of the delegation of the legislative power, uses this language in regard to the exercise of legislative power by municipal government: "We have elsewhere spoken of municipal corporations, and of the powers of legislation which may be and commonly are bestowed upon them, and the bestowal of which is not to be considered as trenching upon the maxim that legislative power must not be delegated, since that maxim is to be understood in the light of the immemorial practice of this country and of England, which has always recognized the propriety and policy of vesting in the municipal organizations certain powers of local regulation, in respect to which the parties immediately interested may fairly be supposed more competent to judge of their needs than any central authority." Cooley, Const. Lim. p. 138; Bish. St. Crimes, §§ 18, 20; Perry v. City of Rockdale, 62 Tex. 451.

The constitution by express provision authorizes the granting to cities of 10,000 inhabitants or more special charters, and this, of course, carries with it, ex vi termini, all incidental powers which appertain to municipal governments. Article 2, § 5, Const. This, of course, obviates any difficulty contained in article 3, § 56, which relates to the inhibition of the passage of any local or special laws except as otherwise provided in the constitution. Nor is there any claim here that the charter provisions are violative of sections 52 and 53 of article 3, which provide against the creation of debts, or lending the credit of the city to certain enterprises. The constitution may be searched in vain for any clause

or section limiting the power of the legislature, in granting special charters to cities of 10,000 inhabitants or over, so as to inhibit them from enacting special laws applicable to the municipality which may abrogate or supersede state laws on the subject; and, unless such constitutional restriction can be found, then the conclusion cannot be escaped that the power here granted the city of Dallas in its charter was legal and valid.

In what has been said I would not be understood as expressing an opinion as to the wisdom or propriety of the legislative enactment on the subject of Sunday closing. Doubtless in authorizing a municipal corporation to pass an ordinance contravening the state law on the subject they believed that the local authorities were best qualified to deal with this question. However that may be, the only matter I am concerned about is the power of the legislature to grant authority to local municipal governments to deal with this subject, and to pass an ordinance which in its effect abrogates and supersedes the state law; and I find nothing in the constitution nor in the decisions which prohibits the legislature from doing what they did in granting this charter to the city of Dallas.

Entertaining these views, I do not concur in the opinion of the majority of the court.

BADER v. STATE.

(Court of Criminal Appeals of Texas. June 24, 1902.)

FORGERY—PROSECUTION—ADMISSIBILITY OF EVIDENCE—VARIANCE.

1. Where a forgery was predicated upon the signing of another's name to a check, which was set forth in hæc verba in the indictment, the failure to allege an indorsement made on the check by defendant in cashing it did not render it inadmissible, as being in variance with the indictment; it being unnecessary to allege or prove an indorsement upon which no forgery is predicated.

Appeal from district court, Llano county; M. D. Slator, Judge.

William Bader, alias C. H. Leifeste, was convicted of forgery, and he appeals. Affirmed.

Jas. Flack, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was charged by indictment with forgery and with uttering and passing a forged instrument. The court in his charge, limited the consideration of the jury to the second count; and the jury found appellant guilty of uttering a forged instrument, and fixed the penalty at confinement in the penitentiary for a term of two years.

There is but one bill of exceptions, which insists that the second count, charging the uttering of a forged instrument, alleges and sets forth in hæc verba the check on the Commercial Bank of Mason, as follows: "Mason, Texas, Nov. 11, 1901. No. ——. The Commercial Bank of Mason: Pay to the order of C. A. Leifeste $196.30 (one hundred and ninety-six $^{30}/_{100}$ dollars). Phillip Eckert." The facts show that the forgery was predicated on signing the name Phillip Eckert. Appellant went under the name of C. A. Leifeste, as well as Wm. Bader. When appellant presented the check to the bank, it being payable to the order of C. A. Leifeste, the bank, upon accepting the same, requested the indorsement of appellant as Leifeste. Appellant insists that the court erred in admitting the check, because of a variance, in that the count charging the uttering of the instrument does not allege in hæc verba the indorsement made by appellant upon the cashing of the same. We have held that, where a forgery is not predicated upon the indorsement of a negotiable instrument, the indorsement on the same need not be alleged or proven. Labbaite v. State, 6 Tex. App. 257; May v. State, 15 Tex. App. 430; Hennessy v. State, 23 Tex. App. 346, 5 S. W. 215; De Alberts v. State, 34 Tex. Cr. R. 508, 31 S. W. 391; Leslie v. State (Tex. Cr. App.) 47 S. W. 367.

The evidence amply supports the verdict of the jury. The judgment is affirmed.

¶ 1. See Forgery, vol. 23, Cent. Dig. §§ 90, 93, 94.

GRESHAM v. STATE.

(Court of Criminal Appeals of Texas. June 18, 1902.)

CRIMINAL LAW—APPEAL—RECORD.

1. A conviction for libel will be reversed when the record on appeal contains neither a complaint nor information.

Appeal from Hood county court; Phil Jackson, Judge.

Newt Gresham was convicted of libel, and he appeals. Reversed.

Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of libel, and his punishment assessed at a fine of $100. There is neither complaint nor information in the record. This being true, there is no basis for the prosecution; and hence the judgment must be reversed, and the prosecution ordered dismissed.

WALLACE v. STATE.

(Court of Criminal Appeals of Texas. June 25, 1902.)

INDICTMENT AND INFORMATION—VIOLATION OF STOCK LAW.

1. An information stating that the live stock sanitary commission recommended, and the governor promulgated, that no cattle should be transported or driven from the area south and east of certain counties into said counties between certain dates, and charging defendant with having driven cattle into the prohibited